

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of:

Promotion of Competitive Networks in  
Local Telecommunications Markets

Docket No. 99-217

**COMMENTS OF**  
**ONFIBER COMMUNICATIONS, INC.**

OnFiber Communications, Inc. (“OnFiber”) hereby submits its Comments in the above-captioned proceeding in which the Wireless Telecommunications Bureau requested information on the current state of the market for local and advanced Telecommunications Services in MultiTenant environments (“MTEs”).

**INTRODUCTION**

OnFiber is a competitive local exchange carrier (“CLEC”) founded in 1999 to construct and operate fiber optic data networks in select metropolitan areas. OnFiber delivers “last mile” optical broadband connectivity services including SONET, Gigabit Ethernet, and Optical Wavelength to service providers and enterprises. OnFiber's unique *HomeRun Fiber*<sup>™</sup> network architecture offers customers rapid provisioning, high reliability, and maximum scalability.

A facilities-based provider, OnFiber competes with the incumbent local exchange carrier (“ILEC”) by installing, operating and managing high capacity optical data circuits. Providing a true facilities-based alternative to the ILEC, OnFiber operates an “open network” by connecting tenants of MTEs (“Tenants”) to their choice of Internet Service Providers (“ISPs”), off-site data

storage providers or other application service providers (“ASPs”), and long-haul carriers.<sup>1</sup>

OnFiber minimizes its reliance on ILEC infrastructure by obtaining its own right-of-ways and performing its own construction. To bring fiber to the “last mile,” OnFiber must acquire the necessary access rights from state and local governmental entities and from MTE owners (“Landlords”) to complete the connection to the Tenant premises.

Many Landlords recognize that OnFiber will increase the attractiveness of their buildings by providing their Tenants with a facilities-based alternative to the ILEC, but even these Landlords do not extend to OnFiber the same type of access enjoyed by the ILEC. Unlike the ILEC, OnFiber must undergo rigorous, time-consuming negotiations with each Landlord before accessing an MTE, and is often asked to pay access charges and accept other onerous contract terms not imposed on the ILEC. The Commission must act quickly to remedy this imbalance because it affects two of the most critical issues facing a CLEC -- service deployment and price. OnFiber urges the Commission to promulgate rules to eliminate discriminatory behavior by Landlords, and/or to specifically require the ILEC to permit the CLEC to access their existing in-building right of ways in an expeditious manner. In the absence of such action, the CLEC will remain at a significant competitive disadvantage.

### **DISCRIMINATION HARMS COMPETITION**

To bring facilities-based competition to MTEs, CLECs must be able to access MTEs under the same terms and conditions as ILECs. ILECs originally obtained access to MTEs by virtue of their legacy monopoly status and they can now change or upgrade their service

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<sup>1</sup> OnFiber can be characterized as an Alternative Distribution Company “ADCO” as described in Phoenix Center Policy Paper Number 12 (November, 2001). See [www.phoenix-center.org](http://www.phoenix-center.org).

offerings without incurring the delays and costs associated with negotiating a new access agreement. CLECs however, must spend significant resources negotiating new access agreements on an MTE-specific basis, and in some cases on a Tenant-specific basis. This disparity adds cost and delay to the CLEC's service provisioning process and impairs its ability to effectively compete with the incumbent.

The Commission must act quickly because discrimination affects two critical areas for CLECs -- service deployment and price. Tenants demand that CLECs provide a firm service deployment date and a competitive price. But obtaining an acceptable building access agreement may result in lengthy delays and increased costs. At the very least, the uncertainty associated with obtaining building access present a serious competitive disadvantage to a CLEC.

To mitigate delays, OnFiber requests building access from all Landlords on its network before receiving a Tenant request for telecommunications service ("Tenant Request"). But OnFiber's efforts to obtain proactive building access have been relatively unsuccessful. To some extent this can be attributed to what can be termed "telecom-fatigue." OnFiber finds that many Landlords have recently invested significant time and money in CLECs, including building-centric local exchange carriers (BLECs) and fixed wireless carriers, that failed to fulfill their ambitious promises and are no longer operating. Unfortunately, many Landlords are now tired of hearing from new CLECs and the state of the telecommunications market generally only serves to exacerbate this problem. With so many telecommunications companies struggling, Landlords often prefer not to spend time on new entrants unless it is in response to a specific Tenant Request. The inability to obtain proactive building access agreements makes it very difficult for CLECs to describe their service footprint. This is in stark contrast to ILECs that can confidently

assert that they serve every building within their service area, and do not have to spend time negotiating new access agreements.

If a CLEC cannot obtain proactive building access, it must negotiate in response to a specific Tenant Request. This is a much less attractive alternative because the CLEC must negotiate quickly or risk losing the customer. This gives a Landlord significant bargaining power to impose onerous contract terms on the CLEC. If the CLEC does not accept the terms offered by the Landlord, then the Landlord can extend the negotiation process to the detriment of the CLEC, which has committed to its customer that it will provide service quickly. The ILEC does not face this difficulty, and this imbalance impairs a CLECs ability to compete.

In addition to delaying service, a Landlord can restrict a CLEC's ability to offer service at a competitive price. CLECs have to expend resources to negotiate, manage and administer access agreements, and are required to pay access fees that are not imposed on ILECs. These access fees are often extracted as a percentage of revenues, flat rate per square foot of the building, or construction of facilities for Landlord's own use. Obtaining the best price for telecommunications services is a critical decision point for potential customers. A CLEC that is subject to access fees not imposed on the ILEC cannot compete effectively.

CLECS are also subject to other onerous contract terms that are not borne by ILECS. Many Landlords unreasonably shift the risk of loss to CLECs in the form of blanket waivers and expansive indemnification provisions. For example, CLECs may be required to include in their sales forms a waiver that would prevent a Tenant customer from recovering any damages against the Landlord, *even if the service interruption was caused by the Landlord*. This problem is magnified if a Landlord also insists on retaining the right to employ a central distribution system ("CDS"). This will typically grant the Landlord the option to purchase installed in-building

CLEC facilities at “market prices” during the term of the agreement and then charge the CLEC a fee to use these facilities. This affects the CLEC’s ability to accurately price its services over a multi-year contract and may also significantly affect service quality. Like many other CLECs, OnFiber provides its customers with service level agreements that provide service credits for network outages. But if the Landlord transitions to a CDS and requires a blanket waiver of claims, then neither the Tenant nor the CLEC can seek recourse against the Landlord even if the CDS fails due to Landlord malfeasance. Moreover, the CLEC may even lack the right to repair the damage, which may result in an extended network outage. Lastly, some Landlords require a CLEC to strictly define which services will be provided in the MTE. As difficult as it is to define telecommunications services today, it is impossible to foresee what services will be requested in the future. This raises the possibility that a CLEC may inadvertently breach its agreement, or be subject to additional fees based on additional service requests from Tenants. ILECs are typically not subject to any of these requirements, and this provides them a substantial competitive advantage.

The solution proposed by the Real Access Alliance in the form of its Model Access Agreement (“Agreement”) does not solve these problems. OnFiber has never obtained building access pursuant to this Agreement, and many of the terms are irrelevant to OnFiber’s business. OnFiber has no information that any ILEC has been required to sign this Agreement. Thus, in addition to the problems briefly described herein, a model agreement in any form would not be effective unless it also governed the ILEC. Moreover, this 50+ page Agreement is a victim of its own thoroughness. It is very comprehensive, designed to cover a panoply of issues involving a range of different CLECs. But this “one size fits all” treatment is very cumbersome for smaller CLECs with specific service offerings and access requirements. Some Landlords may be

tempted to forego discussions altogether and offer the document on a “take-it-or-leave-it” basis, which would not serve the best interests of Landlord, Tenant or CLEC, which would have to try to operate under an inapplicable agreement. For Landlords willing to consider revisions, the broad scope of this document makes customization expensive and time consuming for both sides. The proposed Agreement does not solve the underlying problem.

### **CONCLUSION**

To ensure a level playing field between ILEC and CLEC, OnFiber urges the Commission to promulgate rules that ensure that CLECs receive the same access rights currently enjoyed by ILECs. Expenses and delays imposed by Landlords solely on CLECs directly affect their ability to compete. The Commission must act to ensure that CLECs and ILECs obtain similar rights under similar terms. This is essential to ensure that true facilities-based competition is delivered to Tenants in MTEs.

### **SPECIFIC RESPONSES**

- (1) OnFiber has attempted to contact the owners of almost 1000 commercial buildings, all in suburban markets.
- (2) N/A
- (3) N/A
- (4) N/A

- (5) Access agreements in response to a Tenant Request generally take at least thirty days to negotiate, with an average being approximately sixty days. Negotiations that are not in response to a Tenant request take significantly longer to negotiate.
- (6) OnFiber has been denied access to at least 90% of the buildings where there is no pending Tenant Request. OnFiber's access rate is much higher when negotiations are commenced in response to a Tenant Request.
- (7) In the absence of a Tenant Request, OnFiber does not actively pursue access agreements where negotiations exceed 90 days. OnFiber resumes negotiations upon a Tenant Request.
- (8) Negotiations are much shorter, and denial of access is much less frequent when there is a pending Tenant Request. However, the Landlord's bargaining leverage increases in these circumstances, as described above.
- (9) Access charges often come in the form of percentage of revenues, flat fee per size of the building, or the installation of additional facilities for Landlord.
- (10) OnFiber is not active in all states. Its sole experience in a state with non-discriminatory access charges is the State of Texas.
- (11) Negotiations in the State of Texas are more successful than in other states. OnFiber urges the Commission to promulgate this type of non-discriminatory regulation.
- (12) As a facilities-based alternative to the ILEC, OnFiber encourages CLECs, ISPs and other ASPs to reach their customers over OnFiber fiber optic cable. Once this cable is installed, Landlords do not need to worry about accommodating increased bandwidth needs, because fiber is almost infinitely scalable and can accommodate a variety of applications.

Respectfully submitted,

**ONFIBER COMMUNICATIONS, INC**

**/s/**

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